

## **REMARKS**

Claims 1-41 are pending in the above-captioned patent application following this amendment. Claims 1-41 have been rejected based on obviousness-type, nonstatutory double patenting. The Applicant hereby traverses the rejection of claims 1-41.

No new matter is believed to have been added by this amendment. Consideration of the pending application is hereby requested.

### **Rejections based on Double Patenting**

Claims 1-41 have been rejected based on obviousness-type, nonstatutory double patenting as being unpatentable over claims 1-30 of U.S. Patent No. 6,618,249 issued to Fairchild. The Patent Office states that "although the conflicting claims are not identical, they are not patentably distinct from each other because it has been held that omission of an element and its function (a bracket adapted to receive the plurality of storage devices and to secure the plurality of storage devices) in a combination where the remaining elements perform the same functions as before involves only routine skill in the art." The Applicant hereby respectfully traverses the rejection by the Patent Office on the grounds that 35 U.S.C. § 121 prohibits the cited reference as prior art to reject the claims in the present application, as provided below.

35 U.S.C. § 121 provides in relevant part: "A patent issuing on an application with respect to which a requirement for restriction under this section has been made, or on an application filed as a result of such as requirement, shall not be used as a reference either in the Patent and Trademark Office or in the courts against a divisional application or against the original application or any patent issued on either of them, if the divisional application is filed before the issuance of the patent of the other application." (35 U.S.C. § 121; See also, MPEP 804.01).

The present application is a divisional application of an issued patent, during which a requirement for restriction was imposed under the above-quoted section. During prosecution of the issued patent, the Patent Office imposed a restriction requirement on the Applicant. In the Restriction Requirement, the Patent Office determined that the

application contained the following inventions: Group I - Claims 1-19, drawn to a cooling system for use with a storage system; and Group II - Claims 20-49 drawn to a storage system. The Applicant elected with traverse the claims of Group II. The non-elected claims were directed toward a cooling system for use with a storage system. The Applicant submits that the claims in the present application are directed toward the non-elected subject matter in the issued patent.

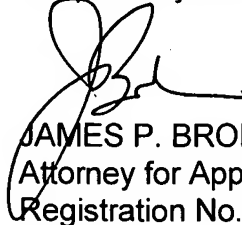
Therefore, pursuant to 35 U.S.C. § 121 and MPEP 804.01, the issued patent (US 6,618,249) cannot be used against the instant divisional application because the instant divisional application was filed on July 2, 2003, prior to the issuance of US 6,618,249 on September 9, 2003, and because the claims are consonant in scope with the restriction requirement during prosecution of the issued patent. Consequently, the double patenting rejection should be withdrawn, and claims 1-41 should be allowed.

#### **CONCLUSION**

The Applicant respectfully asserts that claims 1-41 are allowable as set forth herein. Accordingly, an early notice of allowance is respectfully requested. The Examiner is requested to call the undersigned at 858-672-0454 for any reason that would advance the instant application to issue.

Dated this the 11<sup>th</sup> day of March, 2004.

Respectfully submitted,



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